

KEITH R. O'HARA

IBLA 81-870

Decided September 21, 1981

Appeal from decision of California State Office, Bureau of Land Management, declaring unpatented mining claims abandoned and void. CA MC 59957 through CA MC 59960.

Affirmed in part; reversed in part.

1. Federal Land Policy and Management Act of 1976: Recordation of Mining Claims and Abandonment--Mining Claims: Abandonment

The failure to file the instruments required by sec. 314 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1744 (1976), and 43 CFR 3833.1 and 3833.2 in the proper Bureau of Land Management office within the time periods prescribed therein conclusively constitutes abandonment of the mining claim by the owner.

2. Federal Land Policy and Management Act of 1976: Assessment Work --Mining Claims: Millsites

The failure of a holder of a millsite claim which has been properly recorded under 43 U.S.C. § 1744(b) (1976) to file an annual notice of intention to hold the millsite is a curable defect, and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency.

APPEARANCES: Keith R. O'Hara, pro se.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Keith R. O'Hara appeals the June 23, 1981, decision of the California State Office, Bureau of Land Management (BLM), which declared the unpatented Kids Nos. 1, 2, and 3 lode mining claims and

the Kids No. 1 millsite, CA MC 59957 through CA MC 59960, abandoned and void because evidence of assessment work or a notice of intention to hold the claims had not been filed with BLM on or before December 30, 1980, as required by 43 CFR 3833.2-1.

In his appeal, appellant cites Topaz Beryllium Co. v. United States, 649 F.2d 775 (10th Cir. 1981), in which the Court of Appeals held that a regulation promulgated under the Federal Land Policy and Management Act of 1976, which regulation provided that an unpatented mining claim would be deemed abandoned and void if filings in addition to those required by the Act were not made, was in excess of statutory authority under the Act, since it assumed that even defective filings put the Secretary on notice of an unpatented claim. The Court further stated that once on notice, the Secretary could not deem a claim abandoned merely because supplemental filings required only by the regulations, and not by statute, were not made.

[1] Section 314 of the Federal Land Policy and Management Act of 1976 (FLPMA), 43 U.S.C. § 1744 (1976), requires that the owner of an unpatented lode or placer mining claim on public land shall file a notice of intention to hold the claim or an affidavit of assessment work performed on or for the claim on or before December 30 of each year in the proper BLM office. The section further provides that failure to file the required instruments timely shall be conclusively deemed to constitute an abandonment of the unpatented mining claim. The statutory requirements are replicated in 43 CFR 3833.2-1 and 3833.4. Since the documents which were not filed with BLM by appellant were required by the statute, rather than merely by the regulations, failure to so file justifies the determination by BLM that the mining claims are abandoned and void. Western Mining Council v. Watt, 643 F.2d 618 (9th Cir. 1981).

As the required documents were not filed with BLM on or before December 30, 1980, the mining claims denoted Kids No. 1, No. 2, and No. 3, were properly deemed to be abandoned and void. Susan Mativo, 52 IBLA 134 (1981). This Board cannot waive failure to comply with statutory requirements, nor allay the statutory consequences. Lynn Keith, 53 IBLA 192, 88 I.D. 369 (1981).

[2] However, as to the Kids No. 1 millsite, the BLM decision is not correct. In Mrs. Otis Teaford, 56 IBLA 367 (1981), we held that the failure of a holder of a millsite claim which has been properly recorded under FLPMA to file an annual notice of intention to hold the millsite is a curable defect, and the millsite may not be deemed to have been abandoned absent a failure to comply with a notice of deficiency, citing Topaz Beryllium Co. v. United States, *supra*, and Feldslite Corporation of America, 56 IBLA 78, 88 I.D. (1981). So, in this case, it must be held error for BLM to have declared the Kids No. 1 millsite abandoned and void without prior notice of the deficiency.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed as to the lode mining claims and reversed as to the millsite.

Douglas E. Henriques

Administrative Judge

We concur:

Bernard V. Parrette
Chief Administrative Judge

C. Randall Grant, Jr.
Administrative Judge

